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# The Autonomy of the Contracting Partners: An Argument for Heuristic Contractarian Business Ethics

Gjalt de Graaf

**ABSTRACT.** Due to the domain characteristics of business ethics, a contractarian theory for business ethics will need to be essentially different from the contract model as it is applied to other domains. Much of the current criticism of contractarian business ethics (CBE) can be traced back to autonomy, one of its three boundary conditions. After explaining why autonomy is so important, this article considers the notion carefully *vis à vis* the contracting partners in the contractarian approaches in business ethics. Autonomy is too demanding a condition for the realm of CBE. But a less stringent version of the contract may be possible, a version which uses the contract as a heuristic device, which merely requires moral responsibility. Furthermore, it is argued that views of (human) agency and the moral subject should be made explicit in such a theory.

**KEY WORDS:** autonomy, contract Theory, contractarian business ethics, exit option, ISCT

## Introduction

As the editors of this special issue rightly claim, social contract theory is both a widely celebrated and oft-criticized approach to business ethics. Much of the criticism can be traced back to autonomy, labeled by the guest editors of this special issue in their call for papers as one of its three boundary conditions (Heugens et al., 2004). Here, in four sections, structured according to the use of the contract and

the contracting partners, I discuss what autonomy means for contractarian business ethics (CBE). I explore how contract theories are reperculated by differing views of the moral agent. One of my primary arguments is: *Because of the domain characteristics of business ethics, CBE will need to be essentially different from the contract model as it is applied to other domains.* In order to discuss the use of the concept of ‘contract’ and the contracting partners, first we need to know how contracts are used and who the contracting partners are. Therefore, the approach in this paper is to first distinguish three major interpretations in current CBE and then make a distinction in the use of the concept of ‘contract’ between constitutive and heuristic contract notions. Next, I explore the concept of “consent” in order to make the link between it and the concept of “autonomy” in contract theory. Surprisingly, we will discover, little attention has been given to the notion of consent in CBE even though, like autonomy, it plays a pivotal role. I will also take a closer look at who the contracting partners are: individual actors versus collective actors.

## Contractarian business ethics

### *Three main traditions in contractarian business ethics*

Before I discuss the concept of ‘autonomy’ in CBE in this article, first it needs to be explained what notion of CBE exactly I am talking about. Within the social sciences, there are many different forms of contractarianism. Not just between the different disciplines however, also within business ethics many interpretations of the contract model can be found. Muel Kaptein and Johan Wempe on contractarianism (2002, p. 184):

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These approaches differ with respect to the identified contracting parties: the citizens in society, the participants in the corporation and/or the corporation itself ... Furthermore, there are differences with respect to the character of the contract: hypothetical or actual; discrete or relational; macro, meso, or micro; procedural or substantive; relative or absolute.

Ben Wempe (2005, p. 114) contends that it is slightly confusing that completely different and mutually exclusive interpretations were ventured under the label of a social contract for business. Ben Wempe goes on to discuss what he considers the three main positions in the tradition of CBE: macro-contracts, micro-contracts and an integrated perspective (other contract-based doctrines for business ethics include Anshen (1970) and Rogers et al. (1995)). The macro-contracts position is presented by Tom Donaldson (1982) in which a normative framework is deduced so as to identify social responsibilities in corporations. Of the three most important traditions of CBE, this approach is the most faithful to the classical political philosophers like Hobbes, Locke, and Rousseau: "Proceeding from the idea that there must be something like norms for business, Donaldson seeks to derive these norms in a manner analogous to the classical political contract tradition." (Wempe, 2005, p. 115). Micro-contracts is a position presented Tom Dunfee (1991), in which social contracts are interpreted as "Extant Social Contracts": the gradual emergence of norms in various business sectors and communities. The third position, and arguably the most influential in current CBE, was jointly presented by Donaldson and Dunfee in their book *Ties that Bind* (1999), which can be seen as a synthesis of the earlier deductive and inductive approaches.

#### *Constitutive versus heuristic contractarian business ethics*

Contracts, within and outside business ethics, are often used to describe conventions that are "good" or "bad." The content of such conventions is subject to bargaining. "While conventions are not really contracts, we can view this bargaining over mutually advantageous conventions as the process by which a community establishes its 'social contract'" (Kymlicka, 1990, p. 127). The fact that we voluntarily mutually agree to something is often used as a basis

for *constituting* morals. In this article, this is called the *constitutive device* of the contract model; also called the foundational argument. Such a use of the contract model is the goal of a business ethicist like Soule (2002), who is looking for managerial moral strategies that have moral standing in the sense that managers are morally obliged to follow them. Moral strategies that fit within the integrated social contract theory (ISCT) model (Donaldson and Dunfee, 1994, 1999) are sought explicitly as a basis for normativity; as a constitutive basis for hypernorms.

For the constitutive use of a contract, the concept of consent is essential: the moral codes – however derived or formulated, whatever their criteria – are rational constraints consented to by autonomous persons. After all, anyone who cannot be shown to have (implicitly or explicitly) consented is not morally bound by the contracts. Therefore, central to the constitutive notion of contracts is that agents voluntarily consent to the *terms* of *certain* agreements (more on this later in this section).

Not all contractarians say they need the concept of consent. In the twentieth century, when the contract model made a revival after its introduction by the early classical political contractarians, the contract model was used as a basis for a theory of social justice (Wempe, 2005). Rawls (1971), for example, says people are "ends in themselves," meaning they have a *natural* duty to treat others fairly, which is not something they can consent to but something they owe. As Kymlicka writes, "The contract device helps us determine the content of this natural duty, for it requires that each party take into consideration the needs of others 'as free and equal beings'" (1990, p. 126). Here, according to Kymlicka, instead of being sources of normativity (as was the case with contracts as a constitutive device), contracts express the content of the natural duty: equal respect. Rawls (1971) conducts a thought experiment to discover the meaning and content of respect. To ensure that the contract gives equal consideration to each contractor, Rawls' position abstracts from differences in talent and strength that might create unequal bargaining power (Kymlicka, 1990, p. 126). In this position, the concept of contract is differently used as in a constitutive use of the concept for moral norms. A contract is used as a *heuristic device* to determine what our natural duties precisely are (based on equal respect).

Contractualism like Rawls<sup>1</sup> does not use contracts to *establish* obligations but as a heuristic device, that is, contracts are used as fiction in order to make sense of reality. The concept of contracts is not used as a foundation of moral norms, but as a device to help to determine the content of existing moral norms. Say we choose “basic respect” – a concept whose abstractness challenges its description – as our existing moral norm. We then conduct thought experiments in which the concept of contracts helps to give “basic respect” concrete content.

Within business ethics, both heuristic and constitutive concepts of contract are used. However, within much of CBE, for example in all the three main traditions, contracts are used as constitutive of morals. The ISCT model as developed by Donaldson and Dunfee (1994, 1999), for instance, finds *the* justification for the normative expectations of stakeholders *vis à vis* the corporation (and vice versa) in terms of actual or tacit agreement. Soule (2002, p. 115) even calls the ISCT model arguably the most prominent and promising managerial moral strategy in all of business ethics. Even though the three main traditions of CBE are inspired by the classical social contract theories, the moral norms are not derived in the exact same manner, due to the specific domain of business ethics. This leads to criticism as put forward by Ben Wempe (2005, p. 119): “the main point is here that in both versions of the macro-social contract actual norms of corporate morality are derived with less precision than the substantiation of principles carried out by earlier contract theorists such as Hobbes and Kant and their present day heirs, Gauthier en Rawls.”

### Consent

In the discussion above, the notion of consent was introduced. The concept is important for CBE. Early political contractarians (like Hobbes (1991) and Locke (1988)), who introduced the contract model in the seventeenth and eighteenth century to argue the conditions for the legitimate exercise of political power, realized that to claim a social contract based on an argument, that assumes that a contract was drawn in a state of nature that binds me now – is not a strong argument (Hampsher-Monk, 1992). For this reason, they stressed the concept of consent (Hampsher-Monk, 1992). Contracts (mod-

ern ones) create obligations only if people consent to them. A hypothetical contract that no one consented to is an empty concept unless it can be made clear that people have implicitly consented to it. Hobbes and Locke realized this, which is why Hobbes (1991) found “explicit consent” – a soldier’s oath, for instance – more valuable than “implicit consent.” And it is why Locke (1988) argued that “continual consent” is necessary to legitimize government. Locke (1988) made a distinction between “express consent” and “tacit consent,” stating that the former is necessary to establish government.

### Autonomy

For the concept of consent, the concept of autonomy is vital: we can only consent if we have the *autonomy* to do so. If we are forced into a contract, we invalidate the concept of contract. Therefore, autonomy is essential to the notion of constitutive contractarianism. Donaldson and Dunfee acknowledge this (1999, p. 38): “We begin by noting that at the core of all contractarian approaches is the acceptance of and respect for human autonomy”. To use contract theory as a foundation of normativity (the constitutive device), we must assume that the contractors willfully and freely bind themselves (consent) to those contracts. If the act of contracting is coerced, contract theory can hardly be a basis for legitimizing normative claims. For constitutive contractarians therefore, autonomy of the contracting partners is crucial. Basic to constitutive CBE is the idea of the moral subject, which can be held responsible for autonomous choices. A moral and autonomous person is then linked to the ability and the authority to exercise rights and fulfill obligations (Sevenhuijsen, 1998, p. 55). This aspect, though, gets little attention within, for example, an influential constitutive model within CBE like the ISCT model (Donaldson and Dunfee, 1994, 1999).

Various definitions of autonomy can be given. What is important here is self-governance, which involves the existence of some sort of critical internal capacities and the absence of external control (see also Van Willigenburg, 2003; Schermer, 2001). Even though within the philosophical literature the exact definition of autonomy tends to differ from scholar to scholar, “a realistic definition of autonomy includes at least three conditions: (1) acting inten-

tionally, (2) acting with understanding, and (3) acting free of controlling influences” (Beauchamp, 1991, p. 386). The third condition, also known as the freedom condition, is especially important. Freedom is the core of every notion of autonomy (Beauchamp, 1991, p. 387).

#### *Individual versus collective actors*

Up to now in this section, the different forms of CBE were discussed, a distinction was made in the use of the concept of ‘contract’ (constitutive versus heuristic contract notions), and the concept of ‘consent’ and ‘autonomy’ were discussed and defined. Yet, the following question is still not clear: just who *are* the “contracting parties”? This, it turns out, is difficult to answer. In the ISCT model of Donaldson and Dunfee (1994, 1999) for example, the third main position in CBE (Wempe, 2005) and arguably the most influential in the tradition of CBE, it often remains vague who the contracting partners – the actors – exactly are. It remains unclear *what* has to be expected from *whom* – a serious problem.<sup>2</sup> After all, in the ISCT model the contracts are constitutive of obligations.

Donaldson and Dunfee (1999) do make it clear that both individuals and collective actors, like governmental organizations, can be seen as the contracting partners. When they speak of collective actors as contracting partners, the management of a company is usually the decision-maker with respect to entering into or declining a contract.

At first glance, the so-called *macro-contracts* in the ISCT model seem to be explicitly between institutions and society. Donaldson and Dunfee (1999, pp. 16/17):

At the heart of the social contract effort is a simple assumption. Namely, that we can understand better the obligations of key social institutions, such as business or government. By attempting to understand what is entailed in a fair agreement, or “contract” between those institutions and society also in the implicit contracts that exist among different communities and institutions.

It seems clear here that, primarily, collectives are considered the contracting parties. But things are not that simple. Donaldson and Dunfee define macro-contracts as “broad, hypothetical agreements among rational people” (Donaldson and Dunfee, 1999, p. 19). And people, as we know, are not organizations.

The hypernorms of Donaldson and Dunfee (1999) sometimes seem to be based and legitimized on something other than agreements: common sense. Whether this is a valid approach is a separate matter. It does raise the question, however, of why the concept of contracts is relevant.

Just like the macro-contractors, the *micro-contracting* actors can be both individuals and collectives (Donaldson and Dunfee, 1999). Furthermore, some micro-contracts comprise only collectives while others comprise only individuals. While concrete examples of micro-contracts are usually about individuals, Donaldson and Dunfee write: “The second, or ‘extant’ contracts refer to non-hypothetical, actual agreements existing within and among industries, national economic systems, corporations, trade associations, and so on” (Donaldson and Dunfee, 1999, p. 19).

A distinction between general social contract theory and contract theory within the business domain is that, within the latter, collectives can also contract with other collectives. Organization is, after all, specific to the business domain. I believe the consequences of this specific context for contractarianism are not well worked out in the three main traditions of CBE: Wempe (2005, p. 114) claims “Current CBE ... expects too much from the social contract ... We need to pay proper attention to the domain characteristics of business ethics and the assumptions made by theoretical representations of this field and consider how a social contract theory needs to be set up so as to fit the questions and issues central to business ethics.” How an individual is tied to the morality of an organization (one of the main research questions within business ethics) should be taken into account. But this issue seems, for the most part, ignored in the three main traditions of CBE. Later in this article, I examine it more closely by discussing the autonomy of the organization as opposed to that of the individual; claiming autonomy for collective actors like an organization is plainly different from claiming autonomy for people.

As was argued, the early political contractarians of the seventeenth and eighteenth century used the contract model to argue the positions for the legitimate exercise of political power; the twentieth century political theorists used it as a basis for a theory of social justice. Its use as a framework for corporate morality thus constitutes an entirely new

field of application (Wempe, 2005). Due to the domain characteristics of business ethics, CBE will need to be essentially different from the contract model as it is applied to other domains. In the next four sections, the discussion of possibilities of contract theories within the business domain will revolve around the concept of autonomy. The discussion of autonomy within CBE in these four sections is structured by (a) the use of the contract (constitutive versus heuristic) and (b) the contracting partners (individual actors versus collective actors). See Table I.

### Individual autonomy and constitutive contractarianism

Earlier I made the argument that autonomy is essential for constitutive CBE. A problem with regard to autonomy for constitutive CBE is that a contract within the business context necessarily involves uncertainties. This undermines the second of the three mentioned conditions of autonomy: acting with understanding. But also the first condition, acting intentionally, becomes suspect. This is why Donaldson and Dunfee (1999) discuss the notion of bounded moral rationality.<sup>3</sup> But do they solve the problem this way? How far does the uncertainty in the understanding of the contractors go? This is an important question because the less understanding, the less the contract concept makes sense.<sup>4</sup> After all, if the uncertainty is too large, one does not act with understanding anymore; the concept of contract does not seem to describe any more what goes on in reality (one of the conditions for autonomy is not fulfilled), let alone be a sound basis for moral norms. And the context of business is such that contractors are often necessarily unaware of many effects of their behavior. Unforeseen contingencies could arise. Given the complexity of the

business context (and the unpredictable nature of much technology), uncertainty abounds.

Within the concepts of ethical approaches, images of human nature are expressed (Sevenhuijsen, 1998). These images, in turn, express what it means to be a moral subject, which, in constitutive CBE, is necessarily autonomous, *free* and rational (since this is a boundary condition). Recall that the freedom condition is *essential* for any notion of autonomy, which in turn is essential for constitutive CBE. The three main traditions in CBE however, spend little time defending this particular view of human nature, even while this way of looking at moral subjects inherently leads to a contractual view of society. Sevenhuijsen (1998, p. 55): “Kant links this, following many other philosophers, with the idea of society as a contract ... Being a moral person is thus, almost by definition, linked to the ability and the authority to exercise rights and fulfill obligations.” Meta-ethically speaking, the constitutive contractarians’ autonomous moral subject – which needs many degrees of freedom to autonomously enter into a contract – can easily lead to a contract theory, and by default, open up a discursive space for discussion of rights, justice, and contracts.

The perspective of care ethics (Baier, 1985; Foot, 1972; Sevenhuijsen, 1998) gives rise to criticism of the constitutive contract concept because of a different concept of the moral subject that is used. According to care-ethics philosophers, the terms of social cooperation are often unchosen. They maintain that many relationships – including those in business – are simply not understood as contractual relationships. Baier “rejects contractarian models with their distinct emphasis on justice and rights, because they omit integral virtues and place a premium on autonomous choice among free and equal agents” (Beauchamp, 1991, p. 288). Care ethicists prefer a moral subject who is embedded in concrete relationships with other people “and who acquire an individual moral identity through interactive patterns of behavior, perceptions and interpretations” (Sevenhuijsen, 1998, p. 55). This different concept of the moral subject – whether we agree with it or not – may lead to different ethical theories.

Different philosophers, of course, have different conceptions of moral subjects. Nietzsche’s (1989, 1990) moral person, for example, is determined by social and cultural influences – a view of human

TABLE I  
Possibilities for Contractarian Business Ethics

	Constitutive	Heuristic
Individuals		
Institutions		



nature that differs from contractarianism. “Freedom”, the third condition for autonomy, has so different a meaning in his philosophy that contracts seem a weird (if not impossible) notion to attach to it. With Foucault (1977), we see a modern moral subject as the product of societal power effects; Kant’s autonomous moral subject is the effect of disciplinary power-practices (Zwart, 1996). In a panoptic regime, the individual is constituted into a moral subject by disciplinary practices and normalizing discourses. Kantian subjects are the possibility of existence for experience; for Foucault, experience constitutes the subject (Zwart, 1996).

It is not my purpose to take a stand in this philosophical debate, but to demonstrate that the moral subject of contractarianism is not universally accepted, and that its consequences are not always well thought out in the three main traditions of CBE. And that when the philosophical discussion on autonomy is considered within the business context, a person’s degree of freedom becomes fuzzy: robust arguments concerning social, economic, and natural forces indicate that the roles people perform in a business context largely determine their decisions and behavior; they tend to act by rules determined by society, as society expects them to act (de Graaf, 2003). This argument undermines the freedom condition, the third condition for autonomy. People’s function within the organization gives them a role in society. A good part of identity – and with it the moral subject and its ability to judge and act in freedom – is formed in specific social and cultural situations (de Graaf, 2003). Since role pressure within institutions is especially strong (Du Gay, 1996), the freedom condition can be questioned and therefore the autonomy of individuals within a business context is not a given. March and Olsen (1989) point to the effect of rules and how individuals within institutions are constrained by the construction and elaboration of their meaning.<sup>5</sup> Another argument comes from the English social theorist Zygmunt Bauman (1993). Along with the socialization aspect that affects autonomy, Bauman (1993) mentions another factor: the sociality of the crowd, that is, individuals within an organization tend to show group behavior.<sup>6</sup> Neither socialization within companies nor the sociality of the crowd yields to moral autonomy. These arguments against the autonomy of

the contractors – the foundation of constitutive CBE – land the theory on shaky ground.

Considering all this, does the autonomy concept within the business domain make sense? I think not. Even believers in the concept of moral autonomous (bounded) rational individuals *within the business domain* must concede that individuals are bound in various ways; their freedom is restricted. In that case, does the contract concept make sense as a constitutive device for norms? Again, I think not. Indeed, the concept of contract is not far removed from our common sense, and could serve as a useful concept in business ethics, more on this later. But that the concept can serve as a way to constitute moral norms in and among businesses is doubtful.<sup>7</sup>

#### *Exit option and bargaining power*

The number of contracts out there with explicit consent is negligible. Some CBE scholars might counter with, “Sure, maybe we don’t explicitly consent to many contracts, but contract talk is largely hypothetical.” Hampton is among those scholars’ many critics (1993, p. 381): “As Ronald Dworkin puts it, ‘A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all.’” Others maintain that contracts are *implicit agreements* in which the members “engage in certain acts through which they give their ‘tacit’ consent” (Hampton, 1993, p. 381). This notion too has been widely criticized. Again, it is not for me to join this debate (see Hampton, 1993, for a good overview), but to point out that implicit contracts must have a notion of implicit (tacit) consent. And this introduces the exit option because, without it, tacit consent is untenable.

According to many contractarians (Hampsher-Monk, 1992; Kymlicka, 1990), individual members of any community must have the right to exercise “exit,” or the possibility of being “untied.” This notion dates back to the origins of contract theory; Hobbes (1991) and Locke (1988) consider it extensively. Its reasoning is clear: a contract lacking explicit consent constructs the possibility of implicit consent. But, for the contracts to retain their moral legitimacy, a safeguard must be installed, i.e., an exit. In other words, any member unhappy with the outcome of a

contract within a community can always leave that community. Rawls (1971) avoids the issue of exit, by imagining society as a closed system.

The exit option is not without its own problems and criticism in political contract theory (see Hampsher-Monk, 1992). Might it not be too facile a notion, claiming that anyone who dislikes the laws of a country can leave? It requires a strangely atomistic view of individuals. People have bonds with family and friends; a person's identity is formed within a cultural community. When a law or two is not to their liking, personal immediacies generally preclude their option to exit. That the notion even occurs to them is doubtful.

Within the business context, the exit option is no less problematic. Legitimizing the claim requires that it be a moral foundation for all contractors, including collectives. How the exit option should work for institutions is not clear to me; explanations were not found in the works of the three main traditions of CBE (more on collectives in the next section). Here again, and despite its importance, the business context is not always well thought out in contract theory in constitutive CBE.

Of course, for individuals the exit option works in many contracts, explicit or implicit. Many in the business context, however, position exits such that one of the parties has little choice (e.g., see Keeley, 1988, on contracts of adhesion). For example, if there is only one energy provider in the town where I live, I do not have much choice whether or not to accept its prizes. Another example is that it is always an option for an individual to leave an organization if she does not like its working climate. But this exit option usually comes at great costs for individuals; also other stakeholders are often not materially free to leave organizations (Wempe, 2005, p. 130). Among contracts, exit options generally surface along a spectrum. At one extreme are contracts where choice is viable; at the other is the contract with a town's monopolistic energy provider.<sup>8</sup>

The argument that many relationships in the context of business are not between equals (because of inequalities in power, money, authority, access to resources, and so on) is fairly obvious. This, in turn, affects an individual's bargaining power in contract negotiations. An agreement under coercion cannot be used as a constitutive device – a problem for constitutive CBE. Autonomy cannot exist alongside

coercion or manipulation. The employer's power in society raises the issue of violation of the freedom condition of the employee's autonomy. Provisions could be installed, of course – in this case, “fair” contracts and voluntary consent. But then might not the concept of contract and the understanding of these social relationships become too far removed from each other? Relationships are always unequal to some degree, but are the inequalities in the business domain so distinct that analysis in terms of contracts becomes impractical? Using contracts to constitute norms in business contexts for individuals is problematic. As we have shown, the notion of consent is specious. And since it is a prerequisite for constitutive CBE, it jeopardizes its stance. Due to the many business domain constraints discussed earlier, and because of the inequality in business domain relationships (especially with respect to individuals), the exit option, in general, is a flawed concept for constitutive CBE.

### **Collective autonomy and constitutive contractarians**

Our discussion has thus far focused on the autonomy of individual contractors. But what about collectives, which could, in both macro- and micro-contracts, be the contracting partners? Since some contracts – perhaps many contracts – within the business domain have a collective–collective structure, a closer look is warranted.

At the core of most theories in business ethics (de Graaf, 2003, p. 34) that concentrate on studying moral decisions is “methodological individualism,” which states that behavior of an organization is reducible to the behavior of the individuals that are members of the organization. Generally, methodological individualism is inclined to see moral phenomena as the aggregate consequence of individual behavior. As a social theory, methodological individualism has generally been discredited because it fails to explain several social phenomena within organizations. Many good arguments predicated on economic, natural, or social forces, for instance, can be presented to argue that institutions (not in the sense of organizations or buildings, more in a sense of collective ways of thinking, feeling, and doing) determine, in large part, the decisions and behavior of people (e.g., Foucault 1977). These are



dynamics that transcend individuals. What managers think, feel, intend, or want is not all-important because the various supra-individual causalities have to be taken into account.

### *Organizations have their own dynamics*

Within business ethics, a well-known problem is that collectives do not automatically have autonomy. The moral rules that classical ethical theories prescribe can be used to advise individuals when making decisions. But classic moral theories were not designed for a corporate context (French, 1984, p. xii) where, as noted, different levels of analysis are in play. An important issue for business ethicists is thus to decide how far they can go in applying philosophical moral theories – meant for individuals – to organizations. In the famous words of Velasquez (1998):

Although we say that organizations “exist” and “act” like individuals, they obviously are not human individuals. Yet our moral categories are designed to deal with individual humans who feel, reason, and deliberate, and who act on the basis of their own feelings, reasoning and deliberations.

According to Velasquez (1983), a corporation cannot be held morally responsible. It does not have autonomy. Velasquez is a so-called *moral individualist*. To him intentionality is essentially tied to consciousness. And the human kind of intentionality is necessary for moral responsibility. A related problem is how to punish organizations. Organizations cannot be put in jail and their souls cannot be damned. Many business ethicists who believe that organizations cannot be held responsible in a moral sense spend their energy on individuals within organizations, mostly the decision makers, i.e., managers (de Graaf, 2003). Interesting and wide juridical and managerial literature exists on “who is to blame.”

At the core of the three main traditions of CBE seems to be a moral individualism, with an emphasis on bargaining among conflicting interests: When making their claims on the moral legitimizing effect (the foundation argument) of contracts, contractarians like Donaldson and Dunfee (1999) mostly speak of individuals, and refer to their (bounded) moral

rationality. In discussion of the latter, Donaldson and Dunfee (1999), for example, only speak of human beings and their intellectual and moral capacities. This is understandable if we recall the importance of autonomy for contractarians. And for autonomy, acts must be intentional. But can organizations act intentionally? There are some arguments in business ethics that organizations can act intentionally whether or not it is seen as a human form of intentionality. French (1984) for example, argues that owing to the Corporate Internal Decision (CID) structure, the corporation has its own intentions that cannot be traced back to the intentions of individual persons. But this argument does not get much support in business ethics (Kaptein and Wempe, 2002). Organizations do not have minds, they are not human, and they certainly do not “think” like people. They have their own dynamics, which cannot be reduced to human metaphors. They “act,” but they act in different ways.

Presenting all the arguments for and against the existence of autonomy for collectives is unnecessary here (see Kaptein and Wempe, 2002, chapter 3, for a good overview). The point, however, should be clear: CBE requires a stance in the debate. And strangely, the three main traditions in CBE have stood by moral individualism. Donaldson and Dunfee (1999, p. 17) seem to try to avoid this issue:

The normative authority of any social contract derives from the assumption that humans, acting rationally, consent – or at least consent hypothetically – to the terms of a particular agreement affecting the society or community of which they are a member.

Like the contracts in political theory, the moral foundation of ISCT appears to be based solely on autonomous rational individuals. Here, interestingly, is no mention of collectives. It remains unclear where Donaldson and Dunfee (1994, 1999) get their normative authority for collectives to be autonomous contracting partners, which is especially important in the business domain.

### *Third parties and moral authority*

What about those that are affected by contracts to which they are not a party? This deserves careful consideration in contract theory within business

ethics because the special domain of business ethics comes to the fore. Organizations greatly modify our natural and social environment, chemical pollution being one of their obvious offenses. Organizations direct a large chunk of people's activities for a large chunk of their lives. Technological innovations have increased their impact (Mumford, 1970). Enormous responsibility is embedded within these potent effects of organizations. The largest of them sometimes affect the lives of countless people – in present and future, locally or in broad swaths. But because these actions may well not be exchanges, they are hard to keep in the frame of contracts (Bauman 1993, p. 219).

Some third parties, like future generations or the environment, do not have autonomy. Yet, this is crucial to a contracting partner. *This problem is typical of any ethical theory that founds morals on reciprocity: many relations are simply not reciprocal.* And that especially applies to the domain of business ethics where the impact of contracts on third parties tends to be great. Reciprocity presupposes autonomy and autonomy presupposes equality. Even if we could defend autonomy for collectives, the problem – that some parties are not at the table when decisions affecting them are made – would remain. The environment is never considered a “contractor” in contractarianism. Environmental organizations, perhaps, but who bestows upon them the *moral* right to be the autonomous negotiator for others?

Donaldson and Dunfee (1994, 1999) introduce hypernorms – in this case, broad social norms – to resolve the third-parties problem. And of course, in reality there are all kinds of laws within societies to protect third parties; background institutions in liberal democracies address many of the power/influence imbalance problems.<sup>9</sup> Nevertheless, even with the protection of hypernorms, affected third parties can make *moral* claims, and it is not clear how constitutive CBE can account for that. Provisions can make, and do make, the inequalities less poignant than they appear at first. The problem for constitutive CBE however, is that as long as the contracts are within the hypernorms, laws tend to eliminate third parties' *moral* authority and status of *moral* claims. Even though practical problems can be alleviated, within constitutive CBE moral norms are based on contracts between autonomous partners; the third parties that are mentioned do not have

autonomy, thus undermining their moral status. Constitutive CBE like ISCT makes the effects on third parties look morally neutral, when they are not. When undeserved harm is done, even unintentionally, a victim can hold a company *morally* responsible. The basis for this moral claim is not clear in constitutive CBE. I maintain that contracts do not apply to the moral ground for affected third parties, regardless of autonomy.

### Individual autonomy and heuristic contractarianism

Here we focus on contractarians that use contracts as a heuristic device, that is, contracts used as fiction in order to make sense of reality. The concept of contracts is not used as a foundation of moral norms, as is the case within constitutive CBE, considered in the previous two sections, but as device to help to determine the content of existing moral norms. As will be argued in this section, *when using contracts as a heuristic device, we do not need a strict notion of autonomy.* A notion of people having responsibilities could suffice.<sup>10</sup>

We have demonstrated the dubiousness of autonomy in previous sections; especially when looking at the business domain, people and collectives seem to be bound in many ways. But if there is no autonomy, how about responsibility? Even though Kant (2002) acknowledged that, in actual behavior, we are subject to many determinants, he supposed the freedom to direct our own actions as a transcendental precondition of existence for ethics. The so-called compatibilist position (Wolf, 1990) states that autonomy is not required for responsibility and whatever *is* required is compatible with determinism. My hesitancy to acknowledge autonomy does not mean that I deny the possibility of responsibility. *Normativity presupposes a certain type of free choice.* Even when determinism is true, and especially in the business domain where constraints on the agent are numerous, the position that the agent has the freedom to do the right thing for the right reasons is defensible. Even with a given identity – one we did not choose – we can still acknowledge and subscribe to our responsibilities. Let me explain.

In *Freedom Within Reason*, Susan Wolf (1990) shows how it is possible for us to share reason

without supposing autonomy. This argument is similar to Van Willigenburg's (2003). If our desires are a result of heredity and environment, they come from something external to us. "[T]he agent's will is not wholly or deeply her own because the content of her will is completely determined by forces, people, and events external to herself" (Wolf, 1990, p. 13). For Wolf, the condition of autonomy seems impossible but, she argues, autonomy is not necessary for responsibility. She takes the so-called "Reason View." The ability crucial to responsibility is the ability to act in accordance with "Reason," defined as the ability to do the right things for the right reasons. As Wolf explains it (1990, p. 71):

According to the Autonomy View, having the status of a responsible being depends on having distinctive metaphysical power, the power to choose one path of action or another independently of any forces that would push us in one direction or the other. According to the Reason View, having responsible status depends rather on a distinctive intellectual power, the power to exercise right Reason and to govern one's actions accordingly.

According to Wolf, we can be determined by *both* the good and the past. The important point is that, had we chosen to do so, we could have acted differently.

Thus, rejecting the notion of autonomy does not negate the notion of responsibility. I make choices – sometimes bad ones – and you can hold me responsible. According to Kant (2002), if there is nothing that determines my choices, they are completely arbitrary and therefore are not choices at all. Apart from the impossible position of metaphysical autonomy, people reason and make choices. This does not deny the influence of other forces. As we saw in Wolf's argument, some form of freedom is possible if we suppose that people act according to reason. The question then is, where does reason come from? Let's look at two possibilities.

#### *Two examples of heuristic contract theories not needing autonomy*

The compatibilist position allows us to defend CBE as a heuristic device. Heuristic CBE can help us to understand how people work together in the busi-

ness domain. It can explain the *content* of social norms (note: this is the difference with constitutive CBE, where the contract concept is used to *found* moral norms). People see *reasons* to bind themselves. Despite the many forces influencing them, they can think about their positions and subscribe to their identities.

Defendants of heuristic CBE could argue, for example, that people are utility maximizers. In such case, self-interested people bind themselves to a contract because they see reasons to. They subscribe to it because they see the value of it. They act because they think they can profit from it – something different from thinking it is the right thing to do. But what about people who seem to act *against* their own interests? Well, perhaps self-interested people accept going against their own interests because they think they will gain from the contract in the long run. Acts against their own interests thus become acts of self-interest.

Not all contractarian business ethicists who argue for contracts as a heuristic device need a view of people as utility maximizers. There are other reasons that people bind themselves to contracts. Susan Wolf (1990) argues that the "Reason View" entails that people are able to do the right thing for the right reasons. In this view, people could bind themselves when not personally gaining from it because they think it is the right thing to do. They reason that they are serving the notion of Good, their definition of that notion notwithstanding. Contracts in business ethics within this position could also be used as a device to express the content of social norms.

The view that people act solely out of self-interest seems unduly narrow. After all, people act out of broader interests, too, like social ones. But perhaps this view is also too limited. Both are teleological. Scanlon (1998) would argue for yet another source of reasoning: deontological. People act – or do not act – according to notions of basic respect.

#### *The origin of social norms*

If social norms are not based on contracts as in constitutive CBE, where do social norms come from in a heuristic version of CBE? If we can answer that question, we might have a more interesting story than the hypernorms of ISCT. Here it was argued

that when studying the concept of autonomy, the business contractarians who use the contract as a heuristic device seem to have the strongest position. As they seem best able to avoid the many pitfalls of autonomy; a notion of responsibility suffices. And the latter is defensible even in the business domain. The two types of teleological reasons for people to bind themselves (described above) are compatible with the Reason View, in which autonomy in a strict sense is no longer necessary. Heuristic CBE could add to our understanding as it offers to explain the contents of social norms – in that sense the model has a distinct value. But we should be cautious of the human agency used in this model and the limits it brings to explanatory content. Other representations of human motivation enable adequate accounts of the business domain, too, and advance our understanding of the relationships of markets to other social phenomena (Andersen, 2000, p. 200).

In Elizabeth Anderson's (2000) interesting article about social norms, she shows that Friedman's advice to economists – ignore empirical investigation of the causes of human behavior and theorize on the assumption that people behave “as if” they were self-interested utility maximizers – was not a very good one (Andersen 2000, p. 200). Rational choice theory uses the model of *homo economicus*, which explains conformity to social norms as the product of strategic interactions of instrumental, rational, self-interested individuals. As an alternative, Anderson investigates models that use a *homo sociologicus*. The model using *homo sociologicus* explains conformity of people to social norms in terms of the normativity of norms, and grounds that normativity in the ways individuals see norms as meaningfully expressing their social identities, their relationships to other people, or shared intentions and values (Andersen, 2000, p. 171). These two explanatory strategies are complementary, not mutually exclusive.

According to Anderson and Gilbert, whose view is shaped by showing people's commitment to organizational goals, gives an interesting account of *homo sociologicus*. This comes close to Bauman's theory (1993), earlier discussed in this paper. Andersen (2000, p. 191):

The great puzzle of social norms is not why people obey them, even when it is not in their self-interest

to so. It is, how do shared standards of conduct ever acquire their normativity to begin with? Once we understand this, there is no further difficulty in understanding the motive to obey them. We obey them, because we believe that we ought to. We accept them as authoritative principles of action. This is the guiding idea of *homo sociologicus* – that people have “internalized” them.

People are recruited into organizational roles. Gilbert (1992) defines a social norm as a principle of action jointly accepted by a group. Andersen (2000, p. 193) maintains that to regard people as being jointly committed to a principle, is to regard each of us as thereby having a reason to comply, and to accept that everyone is accountable to everyone with respect to compliance. The normativity or “oughtness” of social norms, then, is an “ought” constitutive of commitments of collective agency. Furthermore Andersen (2000, pp. 194/195) claims,

Each of us is an individual, an “I” with, let us suppose, an associated partial preference ordering. Each of us is also typically a member of a church, a relative in a family, and so forth –each jointly committed to different goals, priorities, and principles of action, representable in part by distinct partial preference ordering ... Reason resolves conflicts among these preference orderings not by weighing one priority against another, but by determining which ranking, in the given context, has authority.

The views that people bind themselves to contracts not because they are utility maximizers, but for the sake of the Good (whatever they think that is) could be a richer notion of the human agency and might therefore help us to interesting insights (explanatory models). According to Wolf (1990), being able to do the right things for the right reasons allows us to do Good. I agree, but with a caveat: the choices we make are still along the lines of our identity. Even if we can do Good, what determines our choices? What determines the notion of Good? I argue that having the faculty to make choices is compatible with the possibility that those choices are made on the bases of forces, people, and events external to the choice-maker.<sup>11</sup>

This brings us back to the importance of the view of human agency used in CBE. Only with a certain rationalistic view of the subject do theories of contracts make sense. The discussion in this section leads

to the conclusion that when defending such a view and basing heuristic CBE on it, the underlying assumptions of the theory, and the fact that no view of human nature is morally neutral, should not be forgotten. According to Hampton (1993, pp. 387/388), Kantian contractarians, including Rawls, have been criticized because they have not convincingly demonstrated that their contractarian theory provides a justified “Archimedean point,” a “morally pure” starting point.<sup>12</sup>

The view that people bind themselves to contract not because they are utility maximizers but for the sake of the Good has a strong notion of rationality in individual behavior. Even though we *can* reason, *can* decide to act according to our reasons, and *can* subscribe to social norms and our identity, the question remains: Can social norms be explained that way? If so, does the rationalistic view most accurately describe and explain them? Phenomena could also be explained with less rationalistic views of human agency, which does not necessarily make them irrational. For example, people act according to their identity and match their behavior to the situation. People internalize local norms that fit their identity in the local situation. Here we encounter the emotional facets of relationships, those influenced by traditions, power, or cultural perceptions. This is a notion different from choice and individual freedom. With such a view of human agency, contract theory, even heuristic CBE, is less valuable in that it does not provide us with all possible insights.

In sum, contracts used as heuristic devices can have value for business ethics. Such thinking does not require a concept of autonomy. A concept of responsibility could be compatible with the constraints on the agent in the business domain. But it is imperative to consider which concept of human agency heuristic CBE uses, for that is the only way to be aware of the limits of its explanations.

### **Collective autonomy and heuristic contractarians**

Much of the discussion on individuals and the heuristic CBE applies to collectives. While recalling that autonomy is necessary for constitutive CBE and that autonomy of collectives is highly questionable,

also recall the defense that strict autonomy is not necessary for CBE as a heuristic device. As with individuals, this opens up possibilities for CBE with collectives as contractors. And, as with individuals, autonomy can be excluded from the idea of responsibility. Thus I stand by the notion that, even if collectives do not have autonomy, they can be ascribed moral responsibility for their actions.

The Reason View can also be applied to collectives. As noted, collectives' actions have impact. I agree with Wilmot's idea (2001, p. 165) that the intention of a corporate act need not reflect the intentions of any individual or group within the corporation. Wilmot (2001, p. 165): “Organizations differ from other non-persons in that they can have powers of reasoning attributable to them, along with reasoned choices as to *how* they pursue their allotted purpose, even though they cannot choose *what* purpose that shall be.” This allows organizations to have a degree of responsibility. As mentioned earlier, Peter French (1984) is a notable example of a philosopher who made a strong argument in favor of corporate moral intentionality (though he later seemed to back away from his argument).

Is intentionality essential to responsibility? The answer is important. While corporations are capable of doing considerable undeserved harm, it is usually the case that it was unintentional (at least, according to most traditional moral theories that specify the behavior within human intentionality). Our organizations are complex: division of labor and expertise renders most employees' actions molecular parts of the whole, leading to problems of intentionality within business ethics. Bauman (1993, p. 18): “Sin without sinners, crime without criminals, guilt without culprits! Responsibility for the outcome is, so to speak, floating, nowhere finding its natural haven.” Some argue that whether an organization's intentionality is seen as a human form or not is superfluous – but not very convincingly (Kaptein and Wempe, 2002). Most cases of organizations (agents), for example, causing environmental pollution are clearly unintentional, and thus do not satisfy the intentionality condition contained in moral responsibility. I am convinced that our ordinary (daily) moral discourse – where the fact that harm is done is more important than the intentionality condition – “casts a considerably wider net” than those business ethicists who defend moral individu-



alism.<sup>13</sup> It is therefore more appropriate. Whatever their intentions – when a company’s “escaped” cloud of poisonous gas carries with it a significant death toll, or when a company’s “leaked” oil devastates an entire ecosystem, or when a company’s “employment” of poorer populations involves servile wages – I maintain that the company is morally responsible.

In sum, collectives can be held responsible without autonomy and, for argument’s sake, can be considered tacit contractors. Thus, possibilities for heuristic CBE with collective contracting partners exist without the concept of autonomy.

## Conclusion

As was argued in this paper, the early political contractarians of the seventeenth and eighteenth century used the contract model to argue the positions for the legitimate exercise of political power; the twentieth century political theorists used it as a basis for a theory of social justice. Its use as a framework for corporate morality thus constitutes an entirely new field of application (Wempe, 2005). Due to the domain characteristics of business ethics, CBE will need to be essentially different from the contract model as it is applied to other domains. After examining the concept of autonomy with respect to CBE in this paper, conclusions can be summarized (Table II).

A constitutive model for moral norms based on contract theory is hard to defend in business ethics because the necessary concepts of autonomy and consent, in the business domain, are highly problematic, both for individuals within companies and the companies themselves. But there are possibilities for CBE using a heuristic contract device because autonomy is not necessary – moral responsibility is enough. Some alternative origins of social norms, needed for such a heuristic device, were discussed in this paper. The particular view of agency however, used in these theories must be considered because it determines (and thereby limits) the possibilities of such a heuristic model. Too often, views on agency and moral subject are (implicitly) assumed to be universally accepted when they are not. Only within certain (rationalistic) views on agency and the moral subject can CBE make sense. A heuristic CBE must

TABLE II  
Possibilities for Contractarian Business Ethics

	Constitutive	Heuristic
Individuals	Problematic	Possibilities
Institutions	Problematic	Possibilities

also make clear the consequences of treating collective actors as moral agents.

## Notes

<sup>1</sup> Van Willigenburg (2003), who will be later discussed in this article, seems to be on the same side of contractualism as Rawls: he does not use contracts to establish obligations.

<sup>2</sup> Which is why many of the current reviews of Donaldson and Dunfee (1999) urge them to become more specific about their hypernorms. Wempe (2005, p. 127) disagrees and believes that ISCT provides far too concrete moral norms for corporations.

<sup>3</sup> I will resist the temptation to conclude that this means, for their contractarian model, that they also need the concept of “bounded autonomy.”

<sup>4</sup> In this light, even the heuristic use of the concept becomes suspect. More on this later.

<sup>5</sup> Individuals within organizations do not seem to act on the basis of rational calculation. They act, according to March and Olsen, on the basis of rules, simple rules about their tasks within organizations. In other words, they act like they are supposed to act. Individual judgments require experience-sharing and collective deliberation; they depend on shared practices. “Self-fulfillment and even the working out of personal identity and a sense of orientation in the world depends upon a communal enterprise ... Outside a linguistic community of shared practices, there would be biological homo sapiens as logical abstraction, but there could not be human beings” (Sullivan, cited in: Kymlicka, 1990). This is especially the case of individual identities within organizations. Individuals form their identities within organizations. “In particular, it should be noted that the values and preferences of political actors are not exogenous to political institutions, but develop within those institutions” (March and Olsen 1989, p. 40). The same goes for business organizations. Values of managers are not formed in their consciences. Both their identities as managers and their conscience are formed in the socialization process within an institution. This leaves little room for an autonomous, “bounded” rational individ-

ual. "Not only do individuals modify perceptions to accommodate preferences, they also modify their preferences to accommodate their perceptions" (March and Olsen 1989, p. 40).

<sup>6</sup> Managers' ethical judgments at work are different from those in their personal lives. In a crowd, what to do is no longer the problem; they do what others do: "Not because what they do is sensible, beautiful or right or because they say so, or because you think so – but because they do it" (Bauman, 1993, p. 132). The effect of crowd behavior on morality is the same as the socialization of individuals: behavior in organizations takes the place of the autonomy of the moral self.

<sup>7</sup> Sure, we could still describe the rule-behavior within organizations that March, Olsen, and Bauman speak of in terms of contracts. "But socialization into a set of rules and acceptance of their appropriateness is ordinarily not a case of entering into an explicit contract. Rules ... are constructed and elaborated through an exploration of the nature of things, of self-conceptions, and of institutional and personal images" (March and Olsen, 1989, pp. 22/23).

<sup>8</sup> The empirical examples given in reference to the exit option by Donaldson and Dunfee (1999) are always about individuals, like lawyers who resign from the American Bar Association (Donaldson and Dunfee, 1999, p. 42). Donaldson and Dunfee agree that this exit is often a 'dramatic' option. But they argue that morality should not be costless. However, not resigning from the American Bar Association is *also* a moral choice. After all: "engaging in a practice is sufficient to imply consent" (Donaldson and Dunfee, 1999, p. 263). And this is relatively costless! So, engaging in an existing practice is a moral choice, yet staying within the boundaries of the *status quo* is usually much less painless than the exit option. In that sense, the drama of the exit option is not so much a moral foundation for contract theory; it is more a foundation of the moral *status quo*.

<sup>9</sup> Think of institutions like codes of corporate governance (empowering shareholders *vis à vis* managers); employee representation (empowering employees *vis à vis* managers); consumer representative organizations (empowering consumers *vis à vis* corporations); and, indeed, organizations speaking out for "third parties," such as fair trade organizations, human rights organizations, etc.

<sup>10</sup> As claimed by Kymlicka (1990, p. 126) in the beginning of this paper, Rawls (1971) seems to agree.

<sup>11</sup> Furthermore, I define Good as a correspondent of social norms (de Graaf, 2003). Norms are not transcendental; they are social, local (de Graaf, 2003). This non-rationalistic view seems incompatible with the Reason View and, in that sense, is an alternative for using

heuristic contract theory to explain the normativity of social norms. Hub Zwart (1996, p. 33): "There is a basic fact of which history informs us, namely that the 'reasonable' individual, free and equal, and the willing to accept 'fair terms of cooperation' had to be produced by force."

<sup>12</sup> Hampton (1993, p. 388) maintains that feminist philosophers criticize Rawls' theory on the same basis when they argue that Rawls' assumption that individuals in his so-called 'original position' are self-interested is motivated by institutions about what counts as a plausible "weak" psychology that is in fact derived from a, according to them, discredited Hobbesian view of human nature.

<sup>13</sup> French used this expression when making a similar argument during the *Business Ethics Conference*, Washington DC, August 3, 2001.

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